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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1972

No.

CHARLES PERMISOHN and ENRIQUE MONIER,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Permisohn and Enrique Monier, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered October 5, 1972, reprinted herein appendix "A" infra, affirming a judgment of conviction found in the United States District Court for the Southern District of New York on May 8, 1972, convicting petitioners Permisohn and Monier of conspiring to deal in firearms, converted starter's pistols, in violation of Title 18 United States Code, section 922(a)(1) and Title 26 U.S.C. Section 5861; dealing in starter's pistols which were readily convertible into firing a bullet in violation of Title 18 U.S.C.

section 922; knowingly receiving and possessing firearms, converted starter's pistols in violation of Title 26 U.S.C. Section 5861; and failure to register under the National Firearms Registration and Transfer Record and violation of Title 26 U.S.C. 5861.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, no opinion.

JURISDICTION

The order of the United States Court of Appeals is dated, October 2, 1972. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3).

The judgment sought to be reviewed is dated and entered October 5, 1972.

QUESTIONS INVOLVED

Whether the government was without jurisdiction to prosecute petitioner whose activities were purely local – within the State of New York and were intended purely for local consumption?

2. Were the provisions of Chapter 44 of the Crime Control Act, dealing with firearms, unconstitutionally vague in that they do not apprise the petitioners of the activities proscribed.

STATEMENT OF THE CASE

Saulo Ortiz, entered Charlie's Bargain Store in December of 1969. He was acting (undercover informant) at the behest of Morton Jacobson, a Special Agent of the Treasury Department Alcohol, Tobbacco and Firearms Division. On this occasion he purchased one starter's pistol from the petitioner Monier who is alleged to have given instructions on their conversion. Ortiz was to return three more times. On the second occasion he purchased two starter's pistols. A third occasion set up the fourth when petitioners were arrested. A search pursuant to a search warrant ensued and starter's pistols and ammunition were seized.

These starter's pistols, according to the government's firearms expert, Gunner Erikson were convertible to firearms in 15 minutes and they could fire 22 caliber ammunition after conversion.

Petitioner Charles Permisohn maintained that he sold Ortiz starter's pistols because Ortiz said they were for a theatrical production. To the best of his belief, based on Mid-West Sales Catalog which listed RTS Starter's pistols (manufacturer of petitioner Permisohn's starter's pistols) did not require a license from the Federal Government. In fact, petitioner Permisohn had a letter from the Treasury Department which listed RTS pistols as not requiring a Federal License. And the government expert likewise testified that certain RTS starter's pistols did not require a license to be sold and if one should wish to inquire which RTS starter's pistols were saleable non-license, one could write the Department of the Treasury. This information though available at special request was not published in the Federal Register.

Sol Mogol, an importer of RTS starter's pistols from Italy prior to the Gun Control Act of 1968. A quantity of the starter's pistols were sold to petitioner Permisohn and later most were returned. Of the starter's pistols that were seized, Mr. Mogol said he would not accept these because they were damaged.

REASON FOR GRANTING THE WRIT

Federal encroachment on matters purely local is involved in the conviction of petitioners for violating the Gun Control Act of 1968. Charlie's Bargain Store, the petitioners and the starter's pistols contained therein, are so remotely connected to foreign commerce that under any theory of Federalism, the government had no jurisdiction to prosecute petitioners as dealers in firearms – commerce clause or taxing power not withstanding. Petitioner's activities, operating a bargain store for local customers, in no way encroaches on federal territory. As for these starter's pistols, although they had been imported from Italy, they had long since ceased travelling in commerce and had come to rest in New York.

This Court has always recognized that even where the origins of goods and merchandise are foreign, their character can still be local and outside Federal control if the use to which they are put is local. *Youngstown Sheet and Tube Co. v. Bowers*, 358 U.S. 534. Only where there is a rational basis for protecting foreign commerce does the government have jurisdiction. *Katzenbach v. McClung*, 379 U.S. 294. And a finding by Congress that local dealings in starter's pistols affect commerce giving rise to Federal jurisdiction under the commerce clause and the government taxing power, is a pre-emption of New York State's reserve power.

In *United States v. Bass*, 404 U.S. 336, this Court required the government prove that the weapon involved effected or had some relation to interstate or foreign commerce for Federal jurisdiction to attach. Although the Bass decision construed the particular wording of 18 U.S.C. 1202(a)(a) similarly, the government should be obliged in this case to prove that the starter's pistols involved and affected foreign commerce at the time of the alleged violations – not merely that sometime in the past these starter's pistols were imported from Italy, as was shown in the instant case.

II. An opportunity to consider whether Chapter 44 of the Crime Control Act – dealing with firearms – are void for vagueness as presented in this petition. Title 18 U.S.C. 921 in its definition of a firearm states:

> "any weapon (including a starter's gun) which will or is designed to or may readily be converted to expell a projectile...."

Section B states:

> "and which has a barrel with a bore of more than a half inch diameter."

As to subdivision B, the starter's pistols are exempt – the bore being less than a half inch.

Reading the language of Subdivision A creates confusion as to the meaning of certain words in the statute. "Readily convertible" to some people (the government expert) may not be readily convertible to others (the petitioners). *Coates v. Cincinati*, 402 U.S. 611, 614

"As a result 'men' of common intelligence must necessarily guess at its meaning"

"Designed to be converted" offers a similar problem. Conversion is a technical, mechanical affair which a person of common intelligence without special training would be at a loss to know which starter's pistols are designed for conversion to expel bullets. It cannot be said that these terms have "a well settled common law meaning" nor can it be said that they contain "a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

Memoranda and statements of policy and interpretation disseminated by the Department of the Treasury, add to the confusion. Correspondence designating which starter's pistols may be sold without a license and are not considered firearms are pre-empted by amended correspondence and only available upon request.

The provisions of Title 5 United States Code Section 552 whereby the Treasury Department must make public information by publishing in the Federal Register descriptions of forms available, "instructions as to scope and contents of all papers, reports and examinations" substantive rules of "general applicability" and "Statements of General Policy and interpretation or general applicability", were ignored. The failure to properly disseminate the information by publication as required by Section 552 of Title 5 of United States Code clearly comes within the scope of Attorney General's memorandum on the public information section of the Administrative Procedure Law:

"FORCE AND EFFECT OF UNPUBLISHED MATERIALS:

Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published" (page 11)

This failure to so publish, adds to the force of petitioner's argument as to the ambiguity and inexactness of the statutory predicate underlying the indictment. Petitioner can hardly be faulted under the circumstance of this case where the government's witness, an agent and expert in the field, lacked sufficient knowledge to ascertain whether any or some starter's pistols were within or exempt from the provisions of the Gun Control Act. It is no wonder that persons such as petitioners who desire to offer for sale starter's pistols of the type and make possessed by petitioners, were ignorant that they were violating the provisions of the Gun Control Act.

Possession of starter's pistols is an innocent act, and unless criminality is so specifically defined, that a person of ordinary intelligence and mechanical skills can comprehend that possession or sale of starter's pistols with certain technical proclivities is criminal the statute is necessarily void for vagueness. *Papachristou v. City of Jacksonville*, 405 U.S. 156; *United States v. Harris*, 347 U.S. 612.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

Arnold E. Wallach
Attorney for Petitioner

APPENDICES

APPENDIX A – ORDER DATED OCTOBER 5, 1972

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of October one thousand nine hundred and seventy-two.

Present: HON. LWONARD P. MOORE
HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Charles Permisohn, Enrique Monier,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B – STATUTORY PROVISIONS INVOLVED

552. Public information–Agency rules, opinions, orders, records, and proceedings.–(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public–

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions:

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice

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of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made

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available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if–

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P.L. 90-23, § 1, 81 Stat. 54.)

18 U.S.C. 922(a) it shall be unlawful: (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of importing, manufacturing or dealing in firearms, or ammunition, or in the course of such business to ship, transport, or receive any firearms or ammunition in interstate or foreign commerce.

26 U.S.C. 5861 PROHIBITED ACTS:

It shall be unlawful for any person – (a)

To engage in business as a manufacturer or importer of or dealer in, firearms without having paid the special (occupational) tax required by Section 5801 of this section or having registered as required by Section 5802; or

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess the firearm made in violation of the provisions of this chapter; or

(d) to receive or possess a firearm which is not registered

to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change or alter the serial number of any identification of a firearm required by this chapter; or,

(h) to receive or possess a firearm having the serial number or other identification required by the chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, receive any firearm in interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

(l) to make, or cause the making, of a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-809

CHARLES PERMISOHN AND ENRIQUE MONIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a four-count indictment returned in the United States District Court for the Southern District of New York, petitioners were charged with engaging in the business of dealing in firearms (starter pistols which were readily convertible to fire live ammunition) without a license, in violation of 18 U.S.C. 922 (a)(1), (Count 2); possessing unregistered firearms (starter pistols already thus converted) made in violation of 26 U.S.C. 5822, in violation of 26 U.S.C. 5861 (c) and (d), (Counts 3-4); and conspiracy to commit these offenses (Count 1). After jury trial they were convicted on all four counts. Petitioner

493-777—73——1

Permisohn was sentenced to concurrent six month terms of imprisonment on each count and petitioner Monier was placed on two years' probation as a youthful offender. The court of appeals affirmed without opinion on October 5, 1972 (Pet. App. A). On November 3, 1972, Mr. Justice Marshall entered an order extending the time for petitioner Permisohn to file a petition for a writ of certiorari to December 4, 1972, the date on which the instant petition was filed. No such extension was granted to petitioner Monier. Accordingly, as to him the petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court.

1. The evidence showed that in late 1969, acting under the direction of agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department, undercover informant Saulo Ortiz purchased from one Ruperto Rios three starter pistols converted by Rios to permit the firing of a bullet. Rios had purchased the starter pistols from petitioner Permisohn at his store, Charlie's Bargain Store (Tr. 17, 189–194, 198–200, 236, 286, 488–492). Thereafter on February 27, 1970, Treasury agents sent Ortiz to Permisohn's store to attempt to purchase pistols. Petitioner Monier, an employee in the store, instructed Ortiz to return the next day because Permisohn was not in (Tr. 19–21, 62–63, 154–155, 237). Returning the next day, Ortiz gave Monier a hand signal previously shown to Ortiz by a Treasury agent (Tr. 22–24, 65). Permisohn, seeing this signal, instructed Monier "to take care of [Ortiz]." Monier sold Ortiz one starter pistol which he brought from the back of the store

(Tr. 22–24, 65, 76–77, 151, 171–172, 238–241). In response to Ortiz' inquiry, Monier stated that Permisohn would not convert the pistol. However, Monier then explained to Ortiz how to perform the conversion himself by drilling out the cylinder and cutting the barrel behind the plug (Tr. 25, 28, 89, 177, 179).

Ortiz returned to Permisohn's store on March 5, gave the same hand signal, and purchased two more starter pistols (Tr. 30–31, 82, 174–175, 239, 242–244).

On March 10 two Treasury agents entered Permisohn's store and, without giving the hand signal, sought to purchase starter pistols; Permisohn told them that he did not stock such pistols (Tr. 245–246, 373–376). Two days later Ortiz again was sent into the store to buy more pistols. Permisohn told Ortiz that his volume of sales had been so large that he could only sell him ten pistols and instructed Ortiz to return the next day. When Ortiz arrived the next day, Permisohn said that he had the guns. Ortiz left, ostensibly to bring his car to the front of the store; Treasury agents then moved in, arrested Permisohn and Monier, and conducted a search which uncovered 17 unconverted and three converted Italian import starter pistols and 450 rounds of .22 caliber ammunition (Tr. 33–34, 124–125, 247–251, 414).

The three converted starter pistols were test fired and found to be operable (Tr. 374). A firearms expert, using nails and an ordinary electric drill, converted two of the seized unconverted starter pistols. Each conversion required five to ten minutes, "some of which time was used in trying to figure out how * * * to handle the problem" (Tr. 387, 393, 395, 400, 404).

2. Petitioners' contention that the instant prosecution was beyond federal jurisdiction is without merit. Counts 3 and 4 of the indictment charged violations of 26 U.S.C. 5861(c) and (d), which are part of the Internal Revenue Code and thus represent a valid exercise of the taxing power granted Congress by the Constitution (Art. I, § 8, cl. 1).

Count 2 charged unlicensed dealing in firearms, in violation of 18 U.S.C. 922(a)(1). The unambiguous language and punctuation of this statute, together with the relevant legislative history, clearly show that it was intended to prohibit all unlicensed dealing in firearms irrespective of any nexus between a particular firearm and interstate or foreign commerce. See *United States* v. *Ruisi*, 460 F. 2d 153 (C.A. 2), certiorari denied, October 16, 1972 (No. 72–142); see also 1968 U.S. Code Cong. & Admin. News, pp. 2114, 2202, 4418.

Petitioners' reliance on *United States* v. *Bass*, 404 U.S. 336, in arguing that such a nexus should be essential to a conviction in each case, is misplaced. *Bass* dealt with another, differently worded statute, 18 U.S.C. App. 1202(a)(1). In *Bass*, this Court, emphasizing the ambiguity of that statute and the lack of a definitive legislative history, concluded that the phrase "in commerce or affecting commerce" appearing in the statute applied to all three antecedents, "receives, possesses, or transports," rather than solely to the last antecedent, "transports." 404 U.S. at 339–347. Thus a connection with interstate or foreign commerce was found to be an essential element of an offense under that statute. Here, in contrast, "[i]t is impossible to

read the statute except as demonstrating that Congress intended to make unlawful unlicensed dealing in firearms whether interstate or intrastate." *United States* v. *Ruisi, supra,* 460 F. 2d at 156. The further contention that, as so interpreted, 18 U.S.C. 922(a)(1) impinges upon the powers reserved to the states, is without merit in view of the principles enunciated by this Court in *Perez* v. *United States,* 402 U.S. 146. See also *United States* v. *Nelson,* 458 F. 2d 556, 559 (C.A. 5); *United States* v. *Crandall,* 453 F. 2d 1216, 1217 (C.A. 1).

3. Petitioners further contend that the phrase "may readily be converted to expel a projectile" appearing in the statutory definition of a "firearm" (18 U.S.C. 921(a)(3)) is too vague to indicate to "men of common intelligence" which types of starter pistols may not be sold without a license (Pet. 5–7).[1] This contention is insubstantial as it ignores the evidence in the case and misinterprets the elements of an offense under 18 U.S.C. 922(a)(1). The act conveys clear notice to dealers and importers in firearms that a license is required to deal in readily convertible starter pistols. The evidence showed that two of the starter pistols seized from Permisohn's store were converted into instruments capable of discharging projectiles in a

[1] 18 U.S.C. 921(a)(3) provides in pertinent part, as follows: "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive * * *." Petitioner erroneously interprets this statute to mean "is designed to * * * be converted" (Pet. 6). The phrase "is designed to" does not relate to the phrase "readily be converted," but is properly read, "is designed to * * * expel a projectile."

period of five to ten minutes using ordinary tools obtainable at a hardware store. "Reasonable men would surely agree that guns which can be so quickly transformed into dangerous weapons are 'readily convertible' * * *." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns,* 443 F. 2d 463, 466 (C.A. 2). Moreover, at the time of Ortiz' original purchase, petitioner Monier explained the technique involved in converting the starter pistol to fire a bullet, and the search of the store conducted incident to petitioners' arrest uncovered three starter pistols already thus converted (Tr. 25, 28, 179, 248).[2] From this evidence one could infer that both petitioners knew that the starter pistols were readily convertible; they are thus in no position to contend that they failed to comprehend the proscription of the statute.

Moreover, 18 U.S.C. 922(a)(1) does not require scienter or guilty knowledge to convict. The proper purpose of the statute is to keep such potentially dangerous weapons out of the hands of unlicensed dealers. Thus "[a]nyone who engages in the business of importing [or dealing in] such devices as starter guns properly is held bound to know or to inquire as to their potential convertibility into dangerous weapons." *United States* v. *16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra,* 443 F. 2d at 466; see also *United States* v. *Quiroz,* 449 F. 2d 583,

[2] We note also petitioner Permisohn's testimony at the trial that "if [Ortiz] said he was going to convert it, I wouldn't have sold it to him" (Tr. 675) which seemed to imply an awareness that the pistols sold to Ortiz could be readily converted.

585 (C.A. 9); *United States* v. *Ruisi, supra,* 460 F. 2d at 156.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

[2] In any event, the convictions on Counts 3 and 4 were based on the three converted starter pistols found in Permisohn's store. As to those counts no issue of guilty knowledge of convertibility can be involved. The sentences on all four counts were concurrent.

U.S. GOVERNMENT PRINTING OFFICE: 1973